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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the Securities Industry and Financial Markets Association (SIFMA), the Chamber of Commerce of the United States of America (Chamber), and the Business Roundtable move for leave to file the accompanying brief as *amici curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents have not consented.

SIFMA is a trade association that results from the November 1, 2006, merger of the Securities Industry Association and The Bond Market Association. It brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that expand and improve markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests in the United States and globally. It has offices in New York, Washington, D.C., and London.

The Chamber is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Business Roundtable (Roundtable) is an association of chief executive officers (CEOs) of leading U.S. companies with $4.5 trillion in annual revenues and more than 10 million employees. Member companies comprise nearly a third of the

total value of the U.S. stock markets and represent over 40 percent of all corporate income taxes paid. Collectively, they returned $112 billion in dividends to shareholders and the economy in 2005. The Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness. The Roundtable's effectiveness is based on the fact that it draws on CEOs directly and personally, and presents government with reasoned alternatives and productive suggestions.

Amici have a strong interest in this case and are well situated to brief the Court on its implications. If the decision below is affirmed, the prospect of antitrust attacks will deter the financial industry from beneficial practices in connection with initial public offerings (IPOs) and other underwritten securities offerings that promote the formation of capital. The likely effects include an increase in the cost of capital for companies offering shares to the public, and damage to the competitiveness of the United States' capital markets.

Amici therefore propose to give the Court guidance on matters that are especially within their expertise. *Amici* seek to demonstrate that the IPO process is pervasively regulated under a regime that balances in a nuanced way the promotion of competition against other policy objectives. *Amici* also are well positioned to advise the Court on the real-world consequences for their members—and ultimately the capital-raising process—of an affirmance. *Amicus* SIFMA brings the perspective of the financial industry, which would have to order its conduct in response to the threat of antitrust liability. And *amici* Chamber and the Roundtable bring the perspective of *issuers* of securities, including corporations going public—a constituency that has a great deal at stake in this case but is otherwise unrepresented in it.

For the foregoing reasons, SIFMA, the Chamber, and the Business Roundtable should be granted leave to file the attached brief.

Respectfully submitted.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The process of distributing an initial public offering (IPO) in the United States is governed by a comprehensive, extraordinarily intricate regulatory program. That program consists of (a) statutes; (b) a vast corpus of rules, restrictions, and guidance promulgated by the Securities and Exchange Commission (SEC); and (c) the rules of the "self-regulatory organizations" (SROs), *i.e.*, the National Association of Securities Dealers (NASD) and the stock exchanges. Literally every aspect of an IPO is subject to the SEC's and SROs' oversight. The capital markets, moreover, are unique, complex mechanisms. As their expert steward, the SEC has been charged with balancing a number of policy goals, including competition, efficiency, and the formation of capital. The tension among those goals is especially pronounced in the context of fixed-price securities offerings, and the SEC, in fulfilling its mandate, frequently draws nuanced distinctions designed to calibrate the competing concerns.

The regime governing the IPO process, then, is a "pervasive" regulatory scheme of the kind that compels a recognition of implied antitrust immunity. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States* v. *Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 730 (1975) (*NASD*). The SEC's supervision of the IPO process

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[1] Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

is so extensive that, just as in *NASD*, immunity is necessary to avoid "the disruption of conflicting judgments that might be voiced by courts"—and juries—"exercising jurisdiction under the antitrust laws." 422 U.S. at 734. This is all the more true because here, as in *Trinko* and *NASD*, the agency seeks to promote competition, among other objectives.

It is no answer to suggest that antitrust law and securities regulation can work together, either by incorporating securities principles into the antitrust Rule of Reason or by isolating discrete practices that the SEC has not authorized or cannot authorize. To let twelve courts of appeals and countless juries apply an all-things-considered test would result in the exact opposite of the uniform regulation Congress deemed desirable in this vital area of economic activity. To hold a hearing in each antitrust case to ascertain the limits of the SEC's authority would combine two notoriously difficult kinds of cases—judicial review of administrative action (or *hypothetical* action) and antitrust litigation—in a single, unwieldy proceeding. No doctrinaire insistence that antitrust law has a role to play in every industry is required by, or consistent with, this Court's precedents.

The court of appeals did not appreciate these considerations and instead became hung up on the fact that the complaints appear, in part, to allege conduct that is flatly prohibited by the securities laws. But that approach "fail[s] to recognize or give effect to the full scope of" antitrust immunity, U.S. Cert.-Stage Br. 8. Where, as here, the concern is with averting the danger of collision between competing legal spheres, the question is not whether the regimes conflict as to each and every particular practice alleged in a complaint, but rather whether the two regimes are broadly compatible. *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). As explained in *Buckman* and *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996)—a case strikingly congruent to this one—engrafting onto a finely tuned system of regulation the possibility of liability from a competing legal regime tends to distort incentives for the regulated entities, and thus can greatly

diminish the importance of the distinctions drawn by the regulatory system.

In this case, if the line of immunity merely tracked the securities rules and gave them no berth, a plaintiff's attorney could too easily plead around an immunity defense and thereby gain discovery and possible class certification, and all while wielding the hammer of treble damages liability. (This is one reason why a remand for re-pleading to conform to the securities laws would serve no useful purpose.) In the real world of financial dealings, IPO participants would respond by steering so wide of the SEC's carefully drawn lines as to make those lines meaningless.

This overdeterrence of useful conduct would be a problem for the whole economy, not just the investment banking firms. The prospect of antitrust liability here would make syndicates riskier for underwriters (who would therefore charge issuers a higher risk premium) and chill conversations used to build demand and thus arrive at an offering price more favorable to the issuer. The result would be to increase the cost of capital for issuers—in other words, to make IPOs more expensive. It follows that financing would become more difficult, and some companies that would otherwise have gone public will choose not to do so. Others will choose to list on foreign exchanges rather than in the United States. Recent years have seen a dramatic migration of IPOs of foreign (and some U.S.) companies from our shores to overseas markets, and one of the most frequently cited reasons for the trend is the comparatively large regulatory burdens and litigation risks associated with the U.S. markets. An affirmance by this Court would exacerbate that trend. For all of these reasons, the antitrust claims at issue serve no useful purpose, and the district court was right to dismiss them.

ARGUMENT

I. The SEC and NASD Pervasively Regulate The IPO Process So As To Balance Competition Against Other Essential Objectives

A. Capital markets are complex, sensitive mechanisms, as the legislators who developed much of the regulatory structure that governs those markets recognized over 70 years ago. See H.R. Rep. No. 73-1383, at 4 (1934); S. Rep. No. 73-792, at 5 (1934). Since then, Congress has continually monitored that structure, and in 1996, it specifically instructed the SEC to take account of competitive considerations, but also to balance those considerations against a number of other policy objectives, including the protection of investors, the promotion of efficiency, and "capital formation." See National Securities Markets Improvement Act of 1996 (NSMIA), Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425, codified at 15 U.S.C. §§ 77b(b), 78c(f), 80a-2.[2]

The goals the SEC must balance are not always in harmony. As a leading antitrust scholar has explained:

> [Antitrust's] goals are much narrower than those of the [SEC], which is certainly concerned with the competitiveness of securities markets, but also with the viability of sellers, with the truthfulness of information, with sharp practices that may injure customers, and with the smooth functioning of trading institutions.

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[2] This is not to say that, before 1996, the SEC never factored competition into the mix. On the contrary, it had a long history of doing so. See, *e.g.*, *NASD*, 422 U.S. at 732-733 (citing *In re NASD, Inc.*, 19 S.E.C. 424 (1945), and *In re NASD, Inc.*, 9 S.E.C. 38 (1941)); see also Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 12, 89 Stat. 97, 127-128 (amending 15 U.S.C. § 78o-3 so that subsection (b)(9) requires NASD rules to "impose [no] burden on competition not necessary or appropriate in furtherance of the purposes of" the Securities Exchange Act of 1934).

> For the SEC these various goals may sometimes be in conflict and must be balanced against each other. By contrast, antitrust is myopic, and is concerned only with preserving competitive markets in the short run.

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003); see also *id.* at 633 (noting that "the regulatory process is often concerned with more [than antitrust], including the vitality of the markets * * * and even the economic health of regulated firms"); see also *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) ("the purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest").

The tension between competition and other regulatory objectives is especially pronounced with respect to the distribution of securities. In a market economy, sellers usually allocate scarce goods among buyers by means of price negotiation or auction—in other words, through competitive pricing. Cf. *Nat'l Soc'y of Prof'l Engineers*, 435 U.S. at 692 (describing price as "the 'central nervous system of the economy'").

In the world of fixed-price offerings of new securities, however, competition over price is *suppressed*, because every investor in such an offering is required to pay the same price. See, *e.g.*, Letter from Gary L. Goldsholle to Dana Fleischman (Nov. 24, 2003), *available at* http://tinyurl.com/yhocak (NASD guidance noting that NASD "Rule 2740 is intended to ensure that all purchasers in a fixed price offering pay the fixed offering price"). This requirement, which antedates even the creation of the SEC, stems from a concern that if "certain purchasers bought shares at a discount * * *, it would discourage others from buying at the public offering price" and thus "disrupt[] the capital formation process." *Id.* (citing Order Approving Proposed Rule Change, SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 19, 1980) (in turn citing 1934 authorities)).

If, however, a seller of scarce products is not in a position to negotiate price freely, the seller will find some other method for achieving a sensible allocation among the more-than-sufficient buyers willing to pay the fixed price. The regulators are aware of this point, which is why (as discussed below) they permit the longstanding practice of allocating "hot" securities issues in ways that favor "better" customers.[3] That is, in the context of fixed-price offerings, the securities industry, with the SEC's blessing and in part because of SEC requirements, has dispensed with one of the fundamental underpinnings of antitrust regulation (free price competition) in exchange for other benefits related to the special needs of the capital markets and the Commission's unique regulatory mandate.

B. The SEC and NASD (an SRO, the rules of which are promulgated under SEC supervision, see 15 U.S.C. § 78o-3) energetically fulfill their mandate in the IPO context. As the district court and the SEC explained below, the SEC has "plenary authority" over the IPO process, Pet. App. 97a, which is governed front to back by an extraordinarily extensive matrix of regulation. Taken together, the Securities Act of 1933, the Securities Exchange Act of 1934, the SEC's regulations, and the NASD's rules cover and constrain: the registration of securities; the formation of syndicates; communications among syndicate members; communications between syndicate members and the public, including potential IPO customers; underwriter compensation, including commission structure and fee arrangements; the allocation of shares; and stabilizing

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[3] See, *e.g.*, Chester S. Spatt, *Financial Regulation: Economic Margins and "Unintended Consequences"* (Mar. 17, 2006), *available at* http://www.sec.gov/news/speech/spch031706css.htm#7 (speech by SEC's chief economist explaining that, "if the seller allocates the offering securities to those investors whose indications of interest during the road show had the largest values, then even though these indications are not binding, the same allocations as in an optimal auction arise").

activities in the aftermarket. See *id.* at 86a-119a (district court opinion); 132a-139a (SEC *amicus* brief).

This regulatory corpus, moreover, reaches precisely the types of activities targeted by plaintiffs. To the extent the complaints here allege anything beyond perfectly normal, lawful activity, the nub of the accusation seems to be that underwriters exacted from their customers undisclosed consideration in exchange for allocation of IPO shares. That consideration allegedly took several related forms, including: (1) commitments to buy (and thereby "ladder" up the price of) the issuer's shares in the aftermarket; (2) commitments to buy other securities, including the issuer's shares in a secondary public offering (*i.e.*, a "tie-in"); and (3) "non-competitively determined commissions on the purchase and sale of other securities." Consol. Compl. ¶¶ 6-8, 42; Pfeiffer Compl. ¶ 116-121. Each of those supposed practices implicates detailed regulations that frequently draw subtle distinctions between the permissible and the impermissible.

Most fundamentally, the SEC requires that the compensation for underwriters of a securities offering be disclosed to the public and approved by the NASD. See 17 C.F.R. §§ 229.508(e), 230.461(a). The NASD in turn defines and limits the compensation that issuers may pay underwriters, and imposes detailed disclosure requirements of its own in that regard. See NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements. Relatedly, the NASD regulates the granting of concessions and discounts in connection with the sale of securities in fixed-price offerings. See NASD Rule 2740: Selling Concessions, Discounts and Other Allowances.

The SEC and NASD, moreover, regulate practices through which IPO allocations are linked to transactions in other securities. The history of SEC attention to this subject stretches back decades.[4] Most recently, the Commission has proposed a

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[4] See, *e.g.*, REPORT OF THE SEC CONCERNING THE HOT ISSUES

rule that would prohibit participants in an offering "from demanding, soliciting, or attempting to induce, or accepting an offer from their customers of any payment or other consideration"—including the purchase of a different security—"in addition to the security's stated consideration." Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, SEC Release No. 34-50831, 69 Fed. Reg. 75774, 75785 (Dec. 17, 2004) ("Amendments to Regulation M"). At the same time, however, the SEC clarified that a firm may permissibly "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid.*

For the NASD's part, it has proposed a rule that would prohibit an NASD member from "offer[ing] or threaten[ing] to withhold" IPO shares "as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided by the member." Notice of Filing of Proposed Rule Changes, SEC Release No. 34-50896, 69 Fed. Reg. 77804, 77805 (Dec. 28, 2004). At the same time, however, the NASD's adjudicative arm recognizes that a customer may legitimately compete for IPO shares by increasing the level and quantity of commissions it pays to a firm in a position to control IPO allocations. See *Dep't of Enforcement* v. *Invemed Assocs.*, No. CAF030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending).

Against this backdrop, consider the plaintiffs' accusations of tie-ins and "non-competitively determined" commissions on trades in other securities as a *quid pro quo* for IPO allocations. To repeat (assuming the proposed rules are adopted), an underwriter may allocate IPO shares to a good customer, but

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MARKETS 37-39 (Aug. 1984); Certain Short Selling of Securities and Securities Offerings, SEC Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974); SEC Release No. 33-4358, 1961 WL 61584 (Apr. 24, 1961).

may not accept extra consideration for IPO shares or "excessive" compensation for non-IPO business. The distinction here between the permissible and impermissible, though rational, is subtle, and there is no reason to think that it would impress a jury (or even a judge) conducting an antitrust inquiry. Yet it is precisely through distinctions like this that the SEC reconciles the promotion of competition with competing interests like capital formation and efficiency.

A similar problem arises with the "laddering" allegations. Underwriters typically seek to allocate IPO shares to customers who they believe will buy and hold, rather than "flip" for a short-term profit. This is entirely appropriate. In fact, the SEC has long recognized the legitimate interest in stabilizing the price of a new security,[5] and today the Commission comprehensively regulates underwriters' use of stabilization and anti-flipping practices. See *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801-802 (2d Cir. 2002); 15 U.S.C. § 78i(a)(6); 17 C.F.R. §§ 240.17a-2, 242.104; see also 69 Fed. Reg. at 77805 (proposed NASD restrictions on anti-flipping penalties). These regulations seek to guard against anti-competitive abuse while still promoting the formation of capital.

If an underwriter is to place securities with longer-term investors, it somehow must determine the intentions of those seeking IPO shares. See, *e.g.*, SECURITIES INDUSTRY ASSOCIATION, CAPITAL MARKETS HANDBOOK § 5.08, at 5-13, 5-14 (John C. Burch, Jr. & Bruce S. Foerster eds., 6th ed. 2007) ("One of the major decision-making tasks facing the lead manager is the determination of why any investor, but particularly an institutional investor, is buying the security

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[5] See, *e.g.*, Reports on Stabilizing Activities, SEC Release No. 34-9605, 37 Fed. Reg. 10960 (May 24, 1972); SEC, Reports on Stabilizing Activities, 21 Fed. Reg. 501 (Jan. 13, 1956); *In re NASD, Inc.*, 19 S.E.C. 424 (1945); Statement of the SEC on the Regulation of 'Pegging, Fixing, and Stabilizing' of Security Prices, SEC Release No. 34-2446, 11 Fed. Reg. 10971 (Mar. 18, 1940).

being distributed. * * * Making allocation decisions correctly is at the heart of deal making."). In this regard, the SEC has given detailed guidance as to the types of conversations that are permitted and prohibited between underwriters and prospective investors. See Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19672, 19674-76 (Apr. 13, 2005) ("Guidance Regarding Prohibited Conduct").

Here, too, the distinctions are subtle, but rational. The SEC has determined that it is permissible during the "book-building" process[6] for an underwriter to "inquir[e] as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity." Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19676. By contrast, if a representative of the underwriter "[s]olicit[s] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," the representative has violated Regulation M, 17 C.F.R. §§ 242.100 – .105 (2005), which prohibits inducing bids and purchases before the end of a distribution. Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19675.

Thus, discussions about the immediate aftermarket must tread a fine line: an underwriter may attempt to determine (a) whether a potential investor intends to *hold* or *sell* in the *immediate aftermarket* and (b) how much of the stock, and at

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[6] "Book-building" is the process by which underwriters attempt to determine the price at which to offer a security, based on indications of interest from institutional investors as to how many shares they would be interested in buying and at what price. See, *e.g.*, Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19674. This process, among other functions, helps the underwriters avoid a failed underwriting—one in which investors are unwilling to purchase the securities at the offering price.

what price, the potential investor desires to own *several months* from the IPO, but must not (c) discuss the customer's intentions regarding *buying* in the *immediate aftermarket*. When and where in this scheme a discussion becomes unacceptable is a question on which an antitrust jury could easily differ from the SEC.

II. The Pervasive Regulation Of The IPO Process Shields These Complaints From Antitrust Attack

A. "[A] detailed regulatory scheme * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (citing *NASD* and *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)). In such cases, immunity "avoid[s] the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'" *Ibid.* (quoting *NASD*).[7]

Immunity is especially appropriate when the regulatory regime requires the agency "to deter and remedy anticompetitive harm," 540 U.S. at 412. For example, in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 (1973), this Court concluded that the Civil Aeronautics Board's authority under the Federal Aviation Act to regulate corporate control of air carriers "pre-empts the antitrust field." The Board's authority was extensive and broad ranging, and it was required to take competitive considerations, among others, into account. In *Trinko*, conduct regulated by the Telecommunications Act of 1996 would have been a "good candidate" for antitrust

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[7] As explained at greater length in petitioners' brief, *NASD* and *Gordon* contemplate at least two types of situations in which repugnance between a set of regulations and antitrust gives rise to immunity: (1) active regulation of the challenged conduct, and (2) a pervasive regulatory scheme. *Amici* focus on the second category but agree with petitioners' arguments respecting the first.

immunity, in part because the applicable regime was an "effective steward of the antitrust function," 540 U.S. at 406, 413. Immunity was unavailable in *Trinko* because of an explicit savings clause, but in *NASD*, where there was no such clause, SEC-regulated conduct was held immune because of a pervasive regulatory scheme that also served as an "effective steward" of competition.

NASD arose out of accusations that a number of securities firms and the NASD were unlawfully restricting the secondary market for mutual fund shares. Count I of the United States' complaint charged a horizontal conspiracy and included allegations of activities that were neither required nor authorized by the applicable statutes, including "discourag[ing] persons who made inquiry about the legality of a brokerage market from participating in a brokerage market," "distribut[ing] misleading information * * * concerning the legality of a brokerage market in mutual fund shares," and "induc[ing] * * * underwriters to include restrictive provisions in their sales agreements." This Court acknowledged that such activities "cannot find antitrust shelter" in the applicable statutes but nonetheless held that "the SEC's exercise of regulatory authority under [the Investment Company Act of 1940] and the Maloney Act is *sufficiently pervasive* to confer an implied immunity." 422 U.S. at 730 & n.42 (emphasis added).

The Court reached that conclusion after a review of the statutory regime governing the distribution of mutual fund shares, as well as the history of abuses that that regime was designed to combat. 422 U.S. at 704-719. "There can be little question," the Court observed, "that the broad regulatory authority conferred upon the SEC * * * enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority." *Id.* at 734. Moreover, the SEC, which is "charged with protection of the public interest as well as the interests of shareholders," had "repeatedly * * * indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility." *Id.* at 732. The Court conclud-

ed—even though the SEC had taken no position on whether Count I should be dismissed—that "[t]he investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act" with respect to the activity at issue. *Id.* at 733. This Court was concerned above all that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735.

B. Those principles have direct application here. The IPO process is subject to a pervasive regulatory scheme, one that is far more extensive than the regime governing mutual fund pricing and distribution at issue in *NASD*.[8] The SEC and self-regulatory organizations have expertly woven an extraordinarily elaborate fabric of regulation. Superimposing antitrust claims—claims often adjudicated by juries, which are poorly equipped to engage in the type of careful line drawing done by the SEC—would create, just as in *NASD*, a substantial danger of "duplicative and inconsistent standards," 422 U.S. at 735.

This is all the more true because the SEC already "weighs competitive concerns," 422 U.S. at 732—although not to the exclusion of all else. Consider once again that, in the IPO

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[8] Apart from the Maloney Act, 15 U.S.C. § 78o-3, which confers general supervisory authority over a registered national securities association, two statutory provisions were at issue in the *NASD* opinion. One, Section 22(d) of the Investment Company Act of 1940, 15 U.S.C. § 80a-22(d), provides that a mutual fund company or a dealer may sell mutual fund shares to the public only at a current public offering price described in the company's prospectus. 422 U.S. at 711 & n.20. The other, Section 22(f) of the same Act, 15 U.S.C. § 80a-22(f), authorizes a mutual fund company to restrict the negotiability or transferability of its shares, provided the restrictions are disclosed in the company's registration statement and do not violate any SEC rules and regulations on the subject (of which there were none). 422 U.S. at 720-721 & n.33.

context, long-standing practices approved by the SEC sometimes *suppress* price competition, and thus dispense with one of the basic moorings of antitrust law. See pages 5-6, *supra*. In theory, one can respond to that fact in at least two ways. One can try to jerry-build antitrust law for a situation in which ordinary price competition is not possible—in other words, ask a jury to apply the Rule of Reason in a way that takes account of regulatory context, as the Second Circuit suggested. Or one can recognize that the most fundamental underpinnings of antitrust law have been so changed by SEC regulation and SEC-approved practices that a single, coherent body of law should check any departures from the *proper remaining* role of competition in allocating new securities issues. The second course, which follows from this Court's precedents, is sounder.

C. The approaches advanced by the court of appeals and by plaintiffs would fragment IPO regulation to an unacceptable degree. The Second Circuit panel suggested (Pet. App. 58a) that antitrust law is sufficiently flexible to take into account securities regulation concerns through the Rule of Reason, and plaintiffs have contended (see *id.* at 62a) that antitrust immunity is unavailable when the SEC has no authority to permit the challenged practice. But there is no reason to think that each of the twelve federal courts of appeals with jurisdiction over securities cases would come to identical conclusions as to either inquiry. This consideration alone should suffice to invoke implied immunity, for Congress, in enacting the securities laws, clearly envisioned a uniform law throughout the United States. The SEC provides that uniformity. Twelve diverse circuits cannot. (Nor, for that matter, can this Court, which is not in a position to review every mixture of antitrust and SEC governance.)

Under the Second Circuit's Rule of Reason suggestion, judges and juries in each circuit would have to balance antitrust along with each of the policy goals that Congress has assigned to the SEC. Worse still, that balancing might take place in 50 state judiciaries under state antitrust laws. No underwriter could

know in advance what court or jury it might face. For related reasons, equally flawed is plaintiffs' suggestion that antitrust be available when an act is one the SEC has no power to permit. Every trial would require a determination of the SEC's authority in the area. Thus, the equivalent of judicial review of an SEC proceeding—and often a hypothetical proceeding—would precede the antitrust trial. This, too, would complicate the progress of litigation, let alone attempts by underwriters to anticipate its outcome, thus further undermining the uniformity of regulation sought by Congress.

III. Immunity Is Not Defeated Simply Because The Complaints Contain Allegations Of Conduct In Violation Of The Securities Laws

The court of appeals resisted immunity because portions of the complaints allege conduct that violates the securities laws. See Pet. App. 65a-67a, 70a. The court of appeals, however, as the United States agrees in urging reversal, "failed to recognize or give effect to the full scope" of antitrust immunity. U.S. Cert.-Stage Br. 8. Where pervasive regulation is concerned, immunity from antitrust does not hinge on whether, as to each specific allegation, there is a literal conflict between antitrust and the securities laws. Rather, the question must be whether the application of antitrust law to this *area of activity* would interfere with the operation of securities regulation. As the SEC explained below: "the concern is with protecting *the full scope of the regulatory regime*, and of the Commission's freedom to act, not with whether the particular conduct has been approved." Pet. App. 149a-150a (emphasis added). That is, the line of immunity must give some berth to the line separating permissible and impermissible conduct under the securities laws, or the objectives of the immunity doctrine will be defeated.

A. As an initial matter, the court of appeals was simply wrong when it stated that, "in every case in the securities context in which this Court or the Supreme Court has ever found implied antitrust immunity, the courts have done so in the wake of SEC authorization—whether past or present—of the specific

anticompetitive behavior," Pet App. 66a. In *NASD*, this Court dismissed even a charge that included allegations of activities that had never been authorized by the SEC. See pages 12-13, *supra*; *NASD*, 422 U.S. at 730 ("It is clear, however, that Count I alleges activities that are neither required by § 22 (d) nor authorized under § 22 (f). And since they cannot find antitrust shelter in these provisions of the Investment Company Act, the question presented is whether the SEC's exercise of regulatory authority * * * is sufficiently pervasive to confer an implied immunity. We hold that it is * * *.").

In the words of the leading antitrust treatise, *NASD* "invoke[d] the broad dangers of collision between antitrust and regulatory regimes *rather than a narrow assessment of the challenged conduct itself. NASD* asked whether *spheres of immunity* are necessary to avoid potential conflict, not whether *an immunity for a specific practice is necessary* to advance particular legislative goals." 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243d, at 325 (3d ed. 2006) (emphasis added and footnote omitted).

Moreover, the panel's statement was limited to the relatively small pool of Supreme Court and Second Circuit cases on antitrust immunity "in the securities context," Pet. App. 66a. Outside that pool, however, where a pervasive regulatory regime has competed with antitrust, this Court and other courts have discerned implied antitrust immunity even for alleged violations of the competing regime. See, *e.g.*, *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) ("[T]he allegations either constitute direct and basic charges of violations of [the Shipping Act], or are so interrelated with such charges as to be, in effect, a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws."); *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162 (1922) (dismissing the possibility that Congress could have intended a shipper who had been forced to pay rates illegal under the Interstate Commerce Act to have "an additional remedy under the Anti-Trust Act"); *Schaefer* v. *First Nat'l Bank of Lincolnwood*, 509 F.2d 1287,

1300 (7th Cir. 1975) (dismissing antitrust claim based on scheme to inflate the price of a stock because "[t]he sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts"); see also *Hughes Tool*, 409 U.S. at 385 (agency's authority over corporate control of air carriers "pre-empts the antitrust field"); cf. *Trinko*, 540 U.S. at 406 (allegations of conduct in violation of the Telecommunications Act of 1996 were a "good candidate" for implied antitrust immunity because of the "detailed regulatory scheme" created by the Act).

B. More generally, any inquiry designed to avoid the "broad dangers of collision between" two legal regimes, AREEDA & HOVENKAMP, *supra*, ¶ 243d, must look at more than just whether the regimes directly clash with respect to the specific conduct at issue.

1. This point is illustrated by *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), in which plaintiffs claiming injury from orthopedic bone screws asserted state-law claims based on allegations that the defendant consulting company had made fraudulent representations to the Food and Drug Administration (FDA or Administration) in connection with the manufacturer's application for regulatory approval. There was no suggestion that federal law permitted the alleged conduct on which the state-law claims were based. In fact, it was precisely because the applicable federal statutes conferred on the FDA "a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration," *id.* at 349, that the state-law claims were impliedly preempted:

> [T]he federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and * * * this authority is used by the Administration to achieve *a somewhat delicate balance of statutory objectives*. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.

Id. at 348 (emphasis added).

Buckman turned on the fact that Congress had created—just as it did in the securities context—a "statutory and regulatory framework under which the [agency] pursues difficult (and often competing) objectives." 531 U.S. at 349. Because the state-law litigation "would exert an extraneous pull on" that careful scheme, *id.* at 353—just as antitrust litigation would disrupt and undermine the SEC's regulation of the IPO process—the two regimes were broadly incompatible. *Buckman*, moreover, recognized that allowing state-law liability to compete with the comprehensive, fine-tuned federal regulatory program would distort incentives for the regulated entities. Potential applicants for FDA approval might be discouraged from seeking certain kinds of approval, or might "submit a deluge of information that the Administration neither wants nor needs" to avoid the possibility that disclosures would be judged insufficient by a court applying state law. *Id.* at 350-351.

It is the same here. If plaintiffs' antitrust claims are sustained, the securities industry will be discouraged from practices and communications that the SEC has recognized as beneficial and in the public interest, because participants will want to avoid being second-guessed by an antitrust court and jury. (It must be remembered as well that federal and state antitrust laws carry criminal penalties in addition to civil liability.) The financial community will thus experience what this Court has described as "the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981); see also Pet. App. 193a-194a (SEC warning panel against "discouraging useful interactions among participants in the offering process" and thus "over-deter[ring] conduct that would serve the interests of the markets and the capital formation process").

2. Precisely these concerns were at play in *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996), in which this Court explained how incentives are distorted when an antitrust attack is superimposed onto a subtle regulatory program. The question

in *Brown* was whether the "implicit antitrust exemption that applies where needed to make the collective-bargaining process work" applied to an agreement that football club owners made unilaterally after they reached impasse with the players' union. *Id.* at 234. The United States as *amicus* urged that the antitrust exemption "should terminate at the point of impasse" because at that point employers are no longer under a labor-law duty to bargain collectively. *Id.* at 244.

This Court rejected that position. Among other difficulties, impasse is not a black-and-white issue. 518 U.S. at 245-246 ("'[I]mpasse' is often temporary * * * . How are employers to discuss future bargaining positions during a temporary impasse?"). Accordingly, employers trying to guess "how an *antitrust* court would later draw the impasse line" would be put in an impossible position:

> Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.

Id. at 246. Rather than make the antitrust exemption trace the line governing the labor-law duty, this Court decided not to leave antitrust courts and their juries "free to second-guess the parties' bargaining decisions." *Ibid.*

This case is the same. If, as the Second Circuit thought sufficient, the line of antitrust immunity traces the line governing the securities-law duty, a securities firm participating in an IPO would be put in the same impossible position as the employers in *Brown*. The firm either would risk antitrust liability for conduct that it believed was consistent with the securities laws, or steer so wide of the SEC's lines (in an effort to avoid antitrust liability) as to avoid potentially productive arrangements.

As if to underscore the similarities between *Brown* and this case, in *Brown* the United States urged this Court to "look[] to

antitrust law's 'rule of reason' to shield—'in some circumstances'—[certain types of] joint actions." 518 U.S. at 246. The Court rejected that and other suggestions for "softening" the bite of antitrust while retaining a role for it in an area pervasively regulated by another body of law. *Ibid.* Yet, in the present case, the Second Circuit panel—which suggested that SEC regulation could be a "consideration" in applying the antitrust Rule of Reason on remand, Pet. App. 58a—accepted just the reasoning this Court rejected in *Brown*. In the panel's view, the "flexibility" to take regulation into account in some ill-defined way "lower[ed] the stakes of any implied immunity evaluation." *Id.* at 60a.

This Court in *Brown*, by contrast, understood that it was not a virtue to apply, after-the-fact, a "flexible"—one might just as well say amorphous—doctrine to conduct otherwise governed by ascertainable standards. See 518 U.S. at 247 (warning against "forcing [negotiators] to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide"). The problem of distorted incentives is enhanced, not diminished, when parties familiar with securities regulation must predict what the Rule of Reason will have to say years later—something even the greatest antitrust experts can rarely do with confidence.[9]

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[9] See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) ("When everything is relevant, nothing is dispositive. * * * The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery."). See also FEDERAL TRADE COMMISSION & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.3 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. * * * Ordinarily, * * * no one factor is dispositive in the analysis.").

Here, under the rule adopted below, underwriters would be put in precisely the quandary described by Chief Justice White (the author of the Rule of Reason, see *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 66-67 (1911)) in holding unconstitutional the federal Lever Act, which made it illegal to charge any "unjust or unreasonable" price for "any necessaries." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921). That statute, Chief Justice White wrote for the Court, "forbids no specific or definite act" and therefore

> leaves open * * * the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can * * * adequately guard against. In fact, * * * to attempt to enforce the [statute] would be * * * equivalent * * * to carry[ing] out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

Id. at 89.

For all of these reasons, the Second Circuit panel approached the issue from the wrong end of the telescope when it assessed the antitrust immunity of the plaintiffs' pleading-stage allegations only after examining them through the lens of the securities laws. The first question has to be not whether the securities laws do or do not allow each particular allegation, but rather whether the entire scheme of securities regulation in this area will be disrupted if it must constantly edge right up against antitrust. From the standpoint of *amici*'s members—that is, participants in the real world of financial dealings who must order their conduct based on predictions about liability—an immunity defense that extends no further than the lines drawn under the applicable pervasive regulatory regime is very little comfort.

C. Some hypothetical examples should concretely illustrate these concerns, and show how easy it would be for a plaintiff to plead around an immunity defense that is precisely co-extensive with the securities regulations.

As discussed above, see pages 7-8, *supra*, the SEC has proposed a rule that would prohibit participants in an offering "from demanding, soliciting, or attempting to induce, or accepting an offer from their customers of any payment or other consideration in addition to the security's stated consideration." Amendments to Regulation M, 69 Fed. Reg. at 75785. At the same time, however, the SEC clarified that "the proposed rule is not intended to interfere with legitimate customer relationships" and that it would be permissible for a firm to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid.* Indeed, it is "standard practice throughout the securities industry" for customers desiring IPO allocations "to compete for them by the amount of non-IPO commission revenue they generate." *Dep't of Enforcement* v. *Invemed Assocs.*, No. CAF030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending).

Suppose the SEC's proposed rule is formally promulgated. Suppose as well that a putative class could truthfully but generically allege that a customer named Institutional Investor, in the months before the eagerly awaited Widget IPO, substantially increased over historic levels the volume of securities trades it placed through financial-services firm Underwriter Defendant, resulting in additional commissions for Underwriter Defendant. Suppose further that in the Widget IPO, in which Underwriter Defendant is a member of the syndicate, Institutional Investor is awarded a significant portion of shares. This scenario might well be consistent with the securities laws, because a customer may increase the volume of orders with a view toward obtaining IPO allocations, see *Invemed Assocs.* at 13-17, and an underwriting firm, or the syndicate of which it is a member, may allocate IPO shares to a favored customer that has retained the firm for other services, see *ibid*; 69 Fed. Reg. at 75785.

Plaintiffs' counsel, however, would undoubtedly attempt to assert an antitrust claim based on allegations that the additional

commissions on the unrelated transactions were "consideration in addition to the security's stated consideration," Amendments to Regulation M, 69 Fed. Reg. at 75785, resulting from what the plaintiffs would call collusion between the syndicate and the customer, or within the syndicate. Because such additional consideration is prohibited by the SEC, plaintiffs' counsel would have little difficulty arguing—if the line of immunity is precisely coextensive with the SEC's lines—that it would be subject to antitrust attack. Such an allegation might well survive a motion to dismiss, especially because the defendants in this hypothesized antitrust action would not be protected by the heightened pleading standards that Congress made applicable to private securities claims in the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 746-747, codified at 15 U.S.C. § 78u-4(b). Accordingly, plaintiffs might then be permitted discovery, and Underwriter Defendant, now likely facing a certified class in addition to the possibility of trebled damages for conduct close to the securities-regulation line, would be under enormous pressure to settle. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). And, if the case proceeded through discovery, the distinctions at issue are sufficiently nuanced that plaintiffs' counsel might even be able to defeat summary judgment, at which point the pressure to settle a trebled claim would be even greater.

Under the rule adopted by the panel below, then, *amici*'s members could avoid being subjected to this kind of litigation only by steering wide and clear of any conduct, even beneficial dealings growing out of "legitimate customer relationships," Amendments to Regulation M, 69 Fed. Reg. at 75785, that at the pleading stage could be labeled a violation of SEC rules and that on summary judgment could generate an issue of fact.

To take another example, the SEC (as discussed above, see page 10, *supra*) permits an IPO underwriter to "inquir[e] as to a customer's desired future position in the longer term * * *, and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket

activity." Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19676. And a customer can certainly offer up his longer-term interests of his own accord. What is not permitted is to "communicat[e] to customers that expressing an interest in buying shares in the immediate aftermarket * * * would help them obtain allocations of hot IPOs." *Id.* at 19675.

Again, if the antitrust immunity line is precisely co-extensive with the securities rules, a plaintiffs' attorney unfettered by the heightened pleading requirements applicable to securities fraud claims may be able to draft an antitrust complaint based on conversations that were close to, but in fact fell on the permitted side of, the line. For *amici*'s members, the rational response would be to avoid or at least drastically limit discussions about intentions following the IPO.

This chilling effect and distortion of incentives, moreover, is no less applicable to communications *among* underwriters. In the course of mounting their "indiscriminate," "theater-wide attack on the syndicate system," Pet. App. 86a, 91a, the plaintiffs accuse the banks of having "frequent communications among themselves * * * about IPOs, Class Securities, their division of revenues, the aftermarket prices of Class Securities, the anticompetitive charges and tie-purchases alleged herein and related matters." Consol. Compl. ¶ 51; see also *id.* ¶¶ 55-56. That is, the sharing of information within syndicates is an essential premise of the Sherman Act claims here.

It is ludicrous to suggest that communications within a syndicate, without more, violate the antitrust laws. Syndicates by their very nature entail ample communication about tactics and allocations, and even the court of appeals recognized that the syndicate system is "a prominent feature of the modern underwriting industry," Pet. App. 5a-6a. But, if the concerted action so integral to syndicates can furnish a predicate for Sherman Act claims based on the types of techniques alleged here, then underwriters will be just as concerned about the potential antitrust implications of their conversations with one another as they will about their conversations with their customers.

D. It follows that the United States' suggestion in its certiorari-stage brief (at 8) that plaintiffs "be required to re-plead to make clear that they are not relying on protected activities," is misplaced. It would be a simple enough matter for a plaintiffs' lawyer to tailor the semantics of his antitrust allegations to the SEC's regulatory proscriptions and thereby (if the United States' suggestion is adopted) avoid dismissal on immunity grounds. But that would still result in the precise circumstance that antitrust immunity in this context is designed to avoid, namely the disruption of a carefully calibrated scheme and concomitant distortion of incentives. Re-pleading would therefore be pointless; the appropriate disposition here is dismissal with prejudice.

IV. An Affirmance Would Interfere With The Objectives Of Securities Regulation and Damage the Competitiveness of U.S. Markets

The IPO process is one of the linchpins of the private economy. It is by "going public" that American enterprises secure financing for major expansion, position themselves to obtain more capital and at lower cost in the future, create liquidity and therefore heightened value for their equity, attract and provide incentives to qualified employees, and enhance their visibility and prestige. An affirmance would interfere with these objectives and thus with the SEC's mandate to promote the formation of capital. Relatedly, an affirmance would disadvantage U.S. capital markets in relation to their international competitors.

The decision below subjects *amici*'s members to the potential for enormous exposure. The plaintiffs in this case are seeking damages for drops in market value associated with at least 850 initial public offerings from 1997 to 2001. See Consol. Compl. Ex. A; Pfeiffer Compl. ¶ 4. The plaintiffs may claim that their damages run into the hundreds of billions of dollars—and that is before trebling. See SECURITIES INDUSTRY FACT BOOK 2002, at 10 (2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf (IPOs raised $76.1 billion in 2000 alone). Moreover, as with securities class

actions, there will be nothing to prevent any class actions against underwriters following future market declines for alleged antitrust violations in connection with syndicate activities before the decline. If these complaints are sustained, then, the banks could become *de facto* insurers against market drops.

That would be a problem for the whole economy, not just the Wall Street firms. The possibility that conduct and communications in connection with IPOs could give rise to antitrust liability would make participation in a syndicate less attractive for potential underwriters. Syndicates would thus become rarer or smaller and in any event more costly—both because of the increased risk of liability and because each member of a smaller syndicate would be risking a greater share of capital in connection with the offering—with the ultimate result that underwriters would charge the issuer a higher risk premium. In other words, the cost of capital to businesses seeking financing would increase, which means, among other things, that some IPOs that otherwise would have occurred will not take place at all, because they will be too expensive for the issuer.

Relatedly, book-building would become more difficult, and again this would be to the detriment not just of the securities industry, but also of businesses seeking capital. One of the purposes of a syndicate is to distribute shares more widely. See, *e.g.*, *Institutional Investor Study Report of the SEC*, H.R. Doc. No. 92-64, Pt. 5, at 2393, 2520 (1971). If overdeterrence makes syndicates smaller and rarer, then we can expect shares to be distributed to fewer investors. At the same time, as discussed above, underwriters will be inhibited from having useful conversations about the offering, which means they are likely to allocate shares only to their most trusted clients. Even with those clients, the banks may be chilled from getting good information about investor interest. Accordingly, pricing will be less efficient, and demand for an offering will be lower, which means that valuations will be less favorable to the issuer. See COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 49 (Nov. 30, 2006), *available at* http://www.

capmktsreg.org/research.html (noting that "extensive book building" of the kind practiced in the United States "helps improve the price at which a stock is sold"). Some of the end results, again, are that financing will become more difficult, and offerings that otherwise would have occurred simply will not take place. The brunt of this effect, moreover, would be borne most directly by potential IPO issuers, which for the most part are smaller companies seeking financing and positioning for increased growth.

Another possibility, especially for foreign corporations, is that the issuer *will* proceed with its IPO, but that it will list its shares on a foreign exchange instead of in this country. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings." INTERIM REPORT, *supra*, at 29-30. Companies choose where to list based in part on where they believe they will get the best value, and that is a function of the cost of capital and any risks particular to specific markets. *Id.* at 4. If, for reasons related to underwriter incentives, the cost of capital increases in the United States' capital markets—markets that until recently have been more favorable than their foreign counterparts from the standpoint of cost of capital, *ibid.*—an issuer may simply choose to list overseas. Similarly, if the litigation risks and regulatory burdens are perceived as too great in the United States, an issuer will go elsewhere.

These concerns are not hypothetical. Recent years have seen companies choosing to list overseas in ever-larger numbers. In 2000, fifty percent of the dollars raised in global IPOs—that is, initial public equity offerings in a market other than the company's domestic market—were raised in the United States. By 2005 that number was down to five percent. INTERIM REPORT, *supra*, at 29. See also Paul Atkins, *A Serious Threat to Our Capital Markets*, WALL. ST. J., June 10, 2006, at A12 (SEC commissioner warning that litigation is driving IPOs overseas).

A major reason for this migration is the burdens of regulation and securities class actions in the United States. "As average settlement values climb, so too do the incentives for companies to try to evade private litigation under the U.S. securities laws by simply choosing to sell their shares elsewhere." INTERIM REPORT, *supra*, at 77; see also *id.* at 39, 45-48, 71-76; Michelle Tsai & Lynn Cowan, *Chinese IPOs Stick Close to Home*, WALL ST. J., Mar. 20, 2006, at C4 (noting that Chinese companies tend to list in Hong Kong rather than the United States, in part because "[t]he U.S. requirements are considered more onerous, and the threat of investor litigation higher"); Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, WALL ST. J., Jan. 26, 2006, at C1 (reporting that the 2002 Sarbanes-Oxley legislation partially accounts for the shift of capital-raising activities to overseas markets). This trend will only be exacerbated if the threat of antitrust litigation increases the costliness of IPOs done in the United States. And the impact of companies' decisions to list overseas includes not just the concrete loss to the American economy of many billions of dollars in underwriting fees and trading revenues, see INTERIM REPORT, *supra*, at 34, but loss of prestige and other intangible consequences.

When all is said and done, then, an affirmance would enrich the plaintiffs' bar at the expense not just of the petitioners, but of smaller businesses, capital formation, and the competitiveness of the American capital markets. That result cannot be consistent with Congress' intent. Indeed, the same Congress that explicitly directed the SEC to balance competition against other factors, see NSMIA, 110 Stat. at 3424-3425, enacted the Private Securities Litigation Reform Act of 1995, which was motivated by concerns that "nuisance filings, targeting of deep-pocket defendants, * * * and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 126 S. Ct. 1503, 1510-1511 (2006). This case is little more than a variation on that theme.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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